

No. 48720-9-II

Court of Appeals, Div. II,
of the State of Washington

State of Washington,

Respondent,

v.

Carissa D. Cannon,

Appellant.

Brief of Appellant

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1. Introduction

Carissa Cannon's defense to the charge of first degree robbery with a firearm enhancement depended on undermining the credibility of the State's witnesses against her. One of those witnesses, Samuel Jackson, was a co-defendant who made a plea agreement with the State in exchange for his testimony against Cannon. Cannon sought to introduce evidence of the details of the plea agreement, to demonstrate Jackson's incentive to testify falsely in order to obtain the benefit of his bargain. The trial court limited the evidence that would be admitted. This limitation violated Cannon's constitutional right to confront witnesses by preventing Cannon from fully revealing the specific reasons why Jackson's testimony may not have been credible.

At sentencing, the trial court imposed discretionary legal financial obligations without any inquiry into Cannon's present or future ability to pay. The court simply stated, "She is a young woman. She has earning potential when she does get out."

4 RP 556.

Cannon asks the Court to reverse her conviction and remand for a new trial. In the alternative, the Court should reverse the LFOs and remand for a proper inquiry into Cannon's ability to pay.

2. Assignments of Error

Assignments of Error

1. The trial court erred in excluding testimony or documents regarding the full details of Samuel Jackson's plea agreement.
2. The trial court erred in imposing discretionary LFOs as part of Cannon's sentence without making a particularized inquiry into Cannon's present and future ability to pay.

Issues Pertaining to Assignments of Error

1. The Washington Supreme Court recently held that it is constitutional error to exclude from evidence a codefendant witness's plea agreement, in violation of the right to confront and cross-examine witnesses. The trial court excluded testimony regarding key details from the plea agreement. Should the case be remanded for a new trial? (assignment of error #1)
2. The Washington Supreme Court has made it clear that discretionary LFOs cannot be imposed unless the court, after a particularized inquiry into the defendant's present and future ability to pay, finds that the defendant will have the ability to pay. The trial court did not make any inquiry. Should the case be remanded for an inquiry into Cannon's ability to pay discretionary LFOs? (assignment of error #2)

3. Statement of the Case

3.1 Summary of the incident

At about 3 a.m., an unknown male came running toward Officer Rodney Halfhill's patrol car, frantically waving his arms, saying that he had just been robbed and "he's got a gun, he's got

a gun.” 2 RP 105. The male, Ludwin Borgen, pointed toward the alleged robber, and Officer Halfhill gave chase. *Id.* Officer Halfhill apprehended the suspect, Samuel Jackson, outside a residence about one block away. 2 RP 107.

Earlier that night, Borgen had spent some time at Jackson’s house a few blocks to the south. 3 RP 243, 395, 398. Borgen testified that he was accompanied by a woman named “Aliyah.” 3 RP 241-42. While at the house, they consumed drugs and “Aliyah” purchased some methamphetamine. 3 RP 247, 249, 404. When they left the house, they discovered that Borgen’s rear tires had been slashed. 3 RP 251. Borgen drove the car one block and stopped near a used car lot. 3 RP 252. Borgen testified that while he attempted to replace one of the tires, “Aliyah” went back to the house. 3 RP 256. The robbery occurred after “Aliyah” left. *See, e.g.*, 4 RP 444. Police never located “Aliyah” and she was not produced as a witness at trial. 4 RP 453; *see* 1 RP 51.

After Jackson was apprehended, Officers Steve Butts and Brett Beall located Borgen’s white Jetta, with two flat rear tires and a jack on the driver’s side. 2 RP 182-84. When the officers approached the vehicle, they found Carissa Cannon waiting in the driver’s seat. 2 RP 184. Cannon was detained. *Id.*

Officer Patrick Patterson requested Borgen’s consent to search the vehicle. 2 RP 190-91; 4 RP 452. Borgen consented to a

search of open areas, but not the glove box, trunk, or center console compartments. 2 RP 191. Borgen feared that the officers might find the purchased methamphetamine. 3 RP 284-85. Borgen was already facing charges in King County for DUI and possession of methamphetamine. 3 RP 364-65. Despite the earlier activities at Jackson's house, Borgen told the officers that he had not taken any drugs that night. 3 RP 321.

Cannon was found to have in her pockets two cell phones, a USB charge cord, and \$380 in cash. 2 RP 187, 195-96. Borgen told police these items had been stolen from him. 2 RP 195, 197. Borgen identified Jackson and Cannon as the robbers. 4 RP 451. Jackson and Cannon were both arrested and charged with First Degree Robbery with a Firearm. *See* CP 7; 4 RP 394. Jackson entered into a plea agreement with the State in exchange for testimony against Cannon. 4 RP 394.

At trial, the State's two key witnesses were Borgen and Jackson. Borgen and Jackson were the only witnesses to testify regarding the robbery itself. Cannon elected not to testify. 4 RP 469-70.

3.2 The victim, Ludwin Borgen, testified about the robbery.

Borgen testified that after he stopped to fix his tires and "Aliyah" left the scene, he was approached by a woman, who he identified as Cannon, coming from the direction of Jackson's

house. 3 RP 263. The woman asked if Borgen was Aliyah's friend. 3 RP 264. Borgen responded, "yes," then noticed Jackson following 10 to 15 feet behind, with a gun between his belt and his pants. *Id.* Jackson pulled the gun. *Id.* Borgen turned toward Cannon only to see that she had a gun, too. *Id.* Jackson and Cannon instructed Borgen to walk into a nearby alley. 3 RP 266.

In the alley, Cannon instructed Borgen to empty his pockets. *Id.* Borgen placed his belongings on a trash can. 3 RP 267. After refreshing his memory, he believed he had about \$460 in his wallet. 3 RP 270-71.

Cannon took Borgen's belongings from the trash can lid. 3 RP 272. Cannon and Jackson, brandishing their guns, demanded that Borgen give them "the drugs," and threatened to "pop" him if he didn't. 3 RP 272-73. Borgen told them maybe Aliyah put the drugs in the car. 3 RP 274. Cannon went back to the car, and Jackson walked Borgen further down the alley. 3 RP 274-75. When they reached the end of the alley, Borgen saw two police cars and ran to them for help. 3 RP 276.

On cross-examination, Cannon's counsel questioned Borgen's memory, observational accuracy, and honesty. *See, e.g.*, 3 RP 337-45 (questioning Borgen's memory, observation, and recognition of clothing and individuals); 3 RP 320-22 (questioning Borgen's denial of using drugs). In closing, counsel argued that there was little evidence corroborating Borgen's

story that the robbery actually occurred. 4 RP 514-15. Counsel noted Borgen's pending charges for possession of methamphetamine, which would have given Borgen a strong motive to lie to police to avoid discovery of the drugs he and Aliyah purchased that night. 4 RP 516, 518

3.3 The co-defendant, Samuel Jackson, testified about the robbery.

Before Jackson testified, he was aware of the story Borgen had told to police and to the parties' attorneys in a transcribed interview. 3 RP 415-16. He was also aware of the contents of the police reports. 3 RP 416.

Jackson testified that Cannon had been living with him for about one month. 3 RP 395-96. They were "seeing each other" during that time. 3 RP 396. Three other roommates lived there at the same time. 3 RP 395. One of the roommates was selling methamphetamine out of his upstairs room. 3 RP 398. Jackson had tried to convince him to stop, but he did not. 3 RP 400-01. Jackson decided to rob the next person who came to buy drugs. 3 RP 401. Borgen was selected as the target. 3 RP 402-03.

A friend named "D" slashed Borgen's tires while Borgen was upstairs. 3 RP 403. After Borgen and Aliyah left the house, Aliyah returned and told Jackson that Borgen had two flat tires and was stopped "down the road." 3 RP 405. Jackson testified that he and Cannon changed into black clothing, got two

handguns, and walked to find Borgen. 3 RP 405-06. Jackson testified that Cannon approached first with the real pistol while Jackson followed behind with the BB gun. 3 RP 406-07.

Jackson ordered Borgen to empty his pockets. 3 RP 409. Cannon collected Borgen's things. 3 RP 410. Borgen told them the drugs were in the car. 3 RP 412. Cannon and Jackson switched guns. 3 RP 407-08. While Cannon went to search the car, Jackson walked Borgen down the alley. 3 RP 410. At the end of the alley, Borgen saw the patrol cars and took off running. 3 RP 410. Jackson fled but was soon apprehended. 3 RP 411.

On cross-examination, Cannon's counsel noted Jackson's knowledge of Borgen's version of events from police reports and interview transcripts. 3 RP 415-16. Counsel questioned how well Jackson actually knew Cannon. 3 RP 422-24. In closing, counsel argued that Jackson offered his testimony solely to get the benefit of his plea agreement—a sentence 100 months less than he would otherwise face. 4 RP 525. Counsel emphasized that Jackson knew all of the details he needed to match Borgen's story. 4 RP 524-25, 527.

3.4 The trial court excluded evidence of some details of Jackson's plea agreement.

Prior to Jackson's testimony, both parties inquired with the court regarding the limits to discussion of the details of Jackson's plea agreement in light of *State v. Ish*, 170 Wn.2d 189,

241 P.3d 389 (2010). 3 RP 383-92. Knowing that Cannon's counsel would want to introduce details that could undermine Jackson's credibility, the State wanted to introduce other details it hoped could rehabilitate that credibility. 3 RP 383-84. Although Cannon's counsel expressed concerns about improper vouching by the State (3 RP 385), both parties demonstrated a desire to stay within the bounds imposed on both sides by *Ish* (*e.g.*, 3 RP 390-92).

The trial court had the opportunity to review the written plea agreement. 3 RP 383:14-18. The court held that the parties could inquire of Jackson regarding the benefit he was to receive (*e.g.*, reduced sentence) and the contingent nature of that benefit, but that the requirement of truthfulness could only be raised if Jackson's credibility was questioned, and the written agreement could not be admitted into evidence. 3 RP 388-91.

Jackson testified that he entered into the plea agreement. 3 RP 393-94. As part of the agreement, he entered a guilty plea for first degree robbery with a firearm and for first degree unlawful possession of a firearm, for which he would face a sentence of 189 to 231 months on the robbery charge and 87 to 116 months on the possession charge. 3 RP 394. In exchange for his testimony against Cannon, the State could choose to allow him to withdraw that plea and instead plead guilty to second degree charges, with an 84 month sentence. *Id.*

The record also reflects that the state would only allow Jackson to withdraw his original plea if his testimony was truthful. 3 RP 384. The State had the option of requiring Jackson to take a polygraph test to verify the truthfulness of his testimony. *Id.* These details were not before the jury. 3 RP 382. The written agreement was tagged as Exhibit 51 at trial.

3.5 At sentencing, the trial court imposed discretionary LFOs without inquiring into Cannon's ability to pay.

The trial court sentenced Cannon to 140 months for the robbery charge, plus 60 months flat time for the firearm enhancement. 5 RP 556. The court imposed fines totaling \$2,300, including \$1,500 for recoupment of appointed defense counsel's fees. *Id.* The court did not inquire into Cannon's ability to pay the fines. *See Id.* The court simply stated, "She is a young woman. She has earning potential when she gets out." *Id.*

The Judgment and Sentence includes the following boilerplate language:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 24. There is no record that the court ever actually made such a consideration or ever inquired into “the defendant’s financial resources” or her “past, present and future ability to pay legal financial obligations.” *See* 5 RP 556.

4. Summary of Argument

Cannon’s defense depended on undermining the credibility of Borgen and Jackson. The trial court violated Cannon’s right to confront the witnesses when it limited the information that could be presented to the jury on Jackson’s plea agreement. The Court should remand for a new trial. If not, the Court should still remand the case for the trial court’s failure to inquire into Cannon’s ability to pay before imposing discretionary LFOs as part of the sentence.

5. Argument

The saying goes that “There is no honor among thieves.” All of the participants in this case have criminal records, at the least including drug charges. It appears that all were present at Jackson’s house, where each of them consumed methamphetamine and were present for a drug deal. But at some point that night, things turned south and the participants turned against each other. Borgen chose to bring in law enforcement and then carefully wove a story that he hoped would let him get away clean, implicating Jackson and Cannon in the process.

The key issue at trial was whether Borgen's story should be believed. The State's closing argument emphasized Jackson's testimony as corroboration of Borgen's story. *E.g.*, CP 44-45; 5 RP 495-96. However, Jackson's plea agreement gave him a significant incentive to make sure his testimony matched Borgen's, in order to please the State and obtain the reduced sentence he bargained for. The jury was unable to fully judge Jackson's credibility because details of the plea agreement were excluded by the trial court.

5.1 The trial court violated Cannon's constitutional right to confront the witnesses against her when it excluded evidence of details of Jackson's plea agreement.

5.1.1 A defendant's confrontation right is violated when the defendant is prevented from presenting full information regarding a testifying codefendant's plea agreement.

The Washington Supreme Court recently held, in *State v. Farnsworth*, ___ Wn.2d ___, No. 91297-1, 2016 WL 3546034 (June 23, 2016), that exclusion of details of a codefendant's plea agreement violates a defendant's confrontation rights:

With a cooperating codefendant witness's plea agreement, the devil is in the details: they establish the extent of the benefit that the witness stands to gain, what will trigger the benefit, and why the witness might testify falsely to gain that benefit. Excluding the plea agreement with all its details

therefore violated Farnsworth's right to confront and cross-examine witnesses. U.S. Const. amend. VI; Wash. Const. art. I, § 22.

Farnsworth, 2016 WL 3546034, at *10, slip op. dissent at 1 (Gordon McCloud, J., dissenting).¹

In *Farnsworth*, the outcome depended on the credibility of the codefendant, McFarland, who was the only witness to testify about whether Farnsworth actually participated in the bank robbery. *Farnsworth* at *10, dissent at 2. Just like Jackson, McFarland pled guilty to the charges against him, with the possibility that the State would vacate and amend the charges after hearing his testimony. *Id.* at *11, dissent at 4-5. The trial court excluded the agreement itself as irrelevant and confusing after McFarland had already testified to some of the terms of the agreement. *Id.* at *12, dissent at 6. A majority of five justices (four for the dissent and one in concurrence) agreed that this was constitutional error.

¹ The Court's opinion on the confrontation issue is set forth in the dissent. The lead opinion, which only four justices signed, upheld Farnsworth's conviction, reasoning that the jury was informed of the contents of the plea agreement, justifying the trial court in excluding the agreement itself. *Id.* at *6, slip op. at 15. Chief Justice Madsen's concurring opinion "agree[d] with the dissent's conclusion that the plea agreement should have been admitted into evidence and failure to do so amounted to constitutional error." *Id.* at *10. Justice Gordon-McCloud's dissent was signed by four justices. Adding the concurrence results in five justices in favor of the dissent's conclusion that excluding the plea agreement was constitutional error.

The *Farnsworth* court reasoned,

The right of cross examination allows more than the asking of general questions concerning bias; it guarantees an opportunity to show specific reasons why a codefendant witness testifying pursuant to a plea bargain might be biased in a particular case. Such cross examination is the price the State must pay for admission of a codefendant's testimony to that plea. The jury needs to have full information about the witness's guilty plea in order to intelligently evaluate his testimony about the crimes allegedly committed with the defendant.

Id. at *13, dissent at 8 (citations omitted).

Here, rather than allowing the jury to have full information about the guilty plea, the trial court excluded key details of the agreement, as well as the agreement itself. 3 RP 388-92. This limitation deprived Cannon of the ability to show the specific reasons why Jackson's testimony should not have been believed.

5.1.2 The error is not harmless beyond a reasonable doubt.

Confrontation Clause violations are subject to a harmless error analysis. *State v. Fisher*, ___ Wn.2d ___, No. 91438-9, slip op. at 11 (July 7, 2016). The court assumes that the damaging potential of the cross examination was fully realized.

Farnsworth, dissent at 10. The State must then prove that the error is nevertheless harmless beyond a reasonable doubt. *Id.*

The test is whether the untainted evidence was so overwhelming that it necessarily leads to a finding of guilt. *Fisher*, slip op. at 11.

The only “untainted” evidence that Cannon had participated in a robbery was the testimony of Borgen. Borgen’s testimony, alone, was not credible. Borgen had trouble remembering details, his observational accuracy was suspect, and he had significant motivations to have lied to police about what happened that night. Borgen’s testimony, alone, is not so overwhelming as to necessarily lead to a finding of guilt.

The details of Jackson’s plea agreement could have revealed the full extent of the benefit Jackson expected to obtain from testifying favorably to the State, what would trigger that benefit, and why he might testify falsely to obtain that benefit. With such information, a reasonable jury could have considered, as a source of reasonable doubt, that Borgen had fabricated the story of Cannon’s involvement in a robbery, out of self-preservation and that Jackson had corroborated Borgen’s story in hopes of pleasing the State. The trial court’s error is not harmless beyond a reasonable doubt.

5.1.3 Cannon sufficiently raised the confrontation issue to the trial court.

The State may argue in response that Cannon waived this confrontation clause challenge by failing to object. However, in

this case, that is merely a technicality. There was no objection because the issue was pre-emptively raised by the State. 3 RP 383. The issue was discussed in depth by the parties and the court, and both parties expressed a desire to present evidence of the agreement to the fullest extent allowable under the law. *See* 3 RP 383-92. After hearing argument by both parties, the trial court limited the evidence based on its understanding of *State v. Ish*, 170 Wn.2d 189, 241 P.3d 389 (2010). This Court should not consider the issue to have been waived.

5.1.4 Even if not preserved, the confrontation issue is a manifest constitutional error that can be raised for the first time on appeal under RAP 2.5(a)(3).

Even if this Court concludes that Cannon failed to preserve the issue, it is one that can be raised for the first time on appeal under RAP 2.5(a)(3). *See State v. Kronich*, 160 Wn.2d 893, 161 P.3d 982 (2007) (overruled on other grounds by *State v. Jasper*, 174 Wn.2d 96, 116, 271 P.3d 876 (2012)). As in *Kronich*, the trial court's error here was a manifest error affecting a constitutional right. It is unquestionably constitutional in nature, as it is grounded in Cannon's confrontation rights under the U.S. and Washington Constitutions. *See Farnsworth*, dissent at 10. It is also "manifest" because it had "practical and identifiable consequences in the trial of the case." *See Kronich*, 160 Wn.2d at 899. If the full plea agreement had been admitted

at trial, Cannon could have significantly undermined Jackson's credibility, raising a reasonable doubt as to whether Cannon actually participated in the robbery.

5.1.5 To the extent the issue was not preserved, it is the result of ineffective assistance of counsel.

To the extent Cannon's counsel may have failed to preserve the issue, counsel provided ineffective assistance. Counsel's strategy, throughout the trial, was to undermine the credibility of Borgen and Jackson in order to raise doubt as to whether Cannon actually participated in the robbery. In pursuit of that strategy, a failure to fully advocate for admission of any evidence that could undermine these witnesses' credibility falls below any reasonable standard of care and results in actual prejudice to Cannon because it significantly weakens the only defense being presented on her behalf.

Because the trial court's exclusion of details of the plea agreement is a constitutional error that is not harmless beyond a reasonable doubt, this Court should reverse Cannon's conviction and remand for a new trial.

5.2 The trial court erred in imposing discretionary LFOs without first inquiring into Cannon's present and future ability to pay.

In an ever-growing string of decisions, the Washington Supreme Court has universally reversed the imposition of

discretionary legal financial obligations (“LFOs”) when the record does not reflect that the trial court has conducted “an individualized inquiry into the defendant’s present and future ability to pay such obligations, as required by RCW 10.01.160. *See, e.g., State v. Marks*, 185 Wn.2d 143, 145, 368 P.3d 485 (2016); *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Even where the defendant has failed to object in the trial court, the appellate courts have consistently exercised discretion to address the issue and remand for the required inquiry. *See State v. Duncan*, 185 Wn.2d 430, No. 90188–1, slip op. at 6-7 (April 28, 2016).

Here, the trial court’s decision was couched in the same sort of conclusory, boilerplate language found inadequate in *Blazina*, 182 Wn.2d at 838. CP 24. Apart from the boilerplate language, there is no record that the court ever actually considered or inquired into “the defendant’s financial resources” or her “past, present and future ability to pay legal financial obligations.” *See* 5 RP 556. The court simply stated, without inquiry or analysis, “She is a young woman. She has earning potential when she gets out.” *Id.* In fact, the only consideration of Cannon’s actual financial circumstances came during the consideration of court-appointed appellate counsel, *after* LFOs had been imposed. 5 RP 557.

Consistent with *Blazina*, *Marks*, *Duncan*, and an ever-growing list of other cases, this Court should address this issue and remand to the trial court for resentencing with proper consideration of Cannon's ability to pay LFOs.

6. Conclusion

Exclusion of details of Jackson's plea agreement violated Cannon's confrontation rights. This Court should remand for a new trial. In the alternative, this Court should remand for resentencing with proper consideration of Cannon's ability to pay LFOs.

Respectfully submitted this 18th day of July, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on July 18, 2016, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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DATED this 18th day of July, 2016.

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